Dinesh Kanavaji a/l Kanawagi & Anor v Virgin Properties Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1498–09 OF 2014
ALIZATUL KHAIR, NALLINI PATHMANATHAN JJCA AND HARMINDAR SINGH J
8 MARCH 2016

Company Law — Directors — Shares — Allotment of shares — Whether directors of company used their position to gain benefits in lodgement of Form 24 of the Companies Act 1965 ('the Act') — Directors sought for declaration that they did not breach provisions of the Act — Applicability of ss 354 and 355 of the Act — Whether relevant — Whether applies to only civil proceedings — Whether breach particularised or conceded to — Whether court could make validating order for any omission, defect or irregularity in management or administration of company

The appellants were directors and shareholders of the first respondent. The appellants/directors intended to increase the paid-up capital of the first respondent. Pursuant to a resolution, the authorised share capital of the first respondent was increased from RM100,000 to RM10m. The appellant's position was that they were authorised by the general meeting resolution. On the same day, the appellants/directors pursuant to the authority given to them issued 7 million shares. The appellants and the first respondent filed the company Form 24 as required by the Companies Act 1965 ('Form 24'). After some time had lapsed, the second respondent received a complaint on regarding the actions and conduct of both appellants in their capacity as directors of the first respondent. Having examined the contents of the complaint, the second respondent commenced an investigation into the matter. The focus of the investigation was on the said Form 24. The appellants filed originating summons ('OS') in the High Court seeking declarations that the appellants as directors and shareholders of Virgin Properties Sdn Bhd ('Virgin Properties') did not use their position as directors to gain benefit or to cause prejudice to Virgin Properties in the lodgment of Form 24 of the Companies Act 1965 ('the Act') which showed that the paid up capital of Virgin Properties as RM7m; the appellants as directors and shareholders of Virgin Properties did not breach any provision of the Act; and the second respondent be restrained or prohibited from instituting any action or interfering with the court's jurisdiction in granting appropriate relief in relation to the lodgment of Form 24 of the Act. The OS was however dismissed by the High Court on 25 August 2014 giving rise to this appeal. The trial judge opined that s 355 was concerned with the rectification of irregularities in the

management or administration of a company, including the absence of quorum at any of a directors' or company meeting or default in the observance of the memorandum or articles of the company, including the failure to lodge any declaration of solvency. As such, the judge came to the conclusion that s 355 was not applicable in the instant case. The judge also came to a finding that s 354 of the Act applied only to civil proceedings and had no application to criminal proceedings. This appeal was primarily concerned with the interpretation and scope of ss 354 and 355 of the Act. The issue that arose was whether the said sections of the Act were wide enough to provide relief to the appellants against any proceedings under the Act including criminal proceedings.

Held, dismissing the appeal with no costs:

(1) A plain reading of s 355 of the Act indicates that power is given to the court to make a validating order in respect of any omission, defect or irregularity in the management or administration of a company under the Act. The important consideration before the court exercises its discretion is to ensure that any such validation will not result in any injustice to the company or to any member or creditor. However, what appeared to have been overlooked by the parties was that before s 355 could be invoked, it was essential to identify the omission, defect or irregularity which allegedly occurred in the management or administration of the company (see paras 18–19).

(2) The appellants were in effect seeking an order that they have not breached any provisions of the Act in the lodgment of Form 24 or gained any benefit as directors to the prejudice of Virgin Properties. However, they have not particularised or conceded to any breach as such. What they appeared to be telling the court was that they were not sure if there was any breach but if there was, they would like the court to validate their actions with respect to Form 24 (see para 22).

(3) Only when a breach was disclosed and conceded will the court be in a position to determine if any such validation could be ordered after considering the justice of the case as required by s 355 of the Act. The court was also in no position to determine if the breach was one that could constitute an omission, error or irregularity as envisioned by s 355 as the breach has not been particularised and conceded. Therefore, s 355 of the Act was not applicable to the circumstances in the present case (see para 23).

(4) Both s 354(1) and (2) of the Act must be taken together to determine if they included relief from criminal proceedings. It could not have been intended for each subsection to operate differently for if that was the case it would have been explicitly made clear. Subsection (2) in any event appeared to cross refer to sub-s (1) in alluding to the power to relieve

under sub-s (1) with the words '… same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought'. The reference to 'negligence' clearly excluded criminal proceedings (see para 26).

[Bahasa Malaysia summary

Perayu-perayu adalah pengarah-pengarah dan pemegang-pemegang saham responden pertama. Perayu-perayu/pengarah-pengarah berniat untuk menambahkan modal berbayar responden pertama. Berikutan resolusi, modal saham yang dibenarkan responden pertama dinaikkan daripada RM100,000 hingga RM10 juta. Kedudukan perayu adalah bahawa mereka dibenarkan oleh resolusi mesyuarat am. Pada hari yang sama, perayu-perayu/pengarah-pengarah berikutan kuasa yang diberikan kepada mereka menerbitkan 7 juta saham. Perayu-perayu dan responden pertama memfailkan Borang 24 syarikat seperti yang dikehendaki oleh Akta Syarikat 1965 ('Borang 24'). Selepas masa telah berlalu, responden kedua menerima aduan berkaitan tindakan-tindakan kedua-dua perayu dalam kapasiti mereka sebagai pengarah-pengarah responden pertama. Setelah memeriksa kandungan aduan, responden kedua memulakan siasatan ke dalam perkara tersebut. Fokus siasatan adalah ke atas Borang 24 tersebut. Perayu-perayu memfailkan saman pemula ('SP') di Mahkamah Tinggi memohon perisytiharan bahawa perayu-perayu sebagai pengarah-pengarah dan pemegang-pemegang saham Virgin Properties Sdn Bhd ('Virgin Properties') tidak menggunakan kedudukan mereka sebagai pengarah-pengarah untuk mendapat keuntungan atau untuk menyebabkan prejudis kepada Virgin Properties dalam memasukkan Borang 24 Akta Syarikat 1965 ('Akta') yang mana menunjukkan bahawa modal berbayar Virgin Properties sebagai RM7 juta; perayu-perayu sebagai pengarah-pengarah dan pemegang-pemegang saham Virgin Properties tidak melanggar apa-apa peruntukan Akta; dan responden kedua dihalang daripada memulakan apa-apa tindakan atau campur tangan dengan bidang kuasa mahkamah dalam memberikan relief sewajarnya berkaitan kemasukan Borang 24 Akta. SP walau bagaimanapun ditolak oleh Mahkamah Tinggi pada 25 Ogos 2014 membuatkan rayuan ini berbangkit. Hakim bicara berpendapat bahawa s 355 adalah berkenaan dengan pembetulan luar aturan dalam pengurusan atau pentadbiran syarikat, termasuk ketidakhadiran korum mana-mana pengarah atau pada mesyuarat syarikat atau kegagalan mematuhi memorandum atau artikel-artikel syarikat, termasuk kegagalan untuk memasukkan apa-apa perisytiharan kemampuan bayar. Dengan itu, hakim memutuskan bahawa s 355 tidak terpakai kepada kes ini. Hakim juga mendapati bahawa s 354 Akta hanya terpakai kepada prosiding sivil. Rayuan ini mementingkan terutamanya dengan tafsiran dan skop ss 354 dan 355 Akta. Isu yang berbangkit adalah sama ada seksyen-seksyen Akta tersebut adalah luas untuk memperuntukkan relief kepada perayu-perayu terhadap apa-apa prosiding di bawah Akta termasuk prosiding jenayah.

Diputuskan, menolak rayuan tanpa kos:

(1) Pembacaan biasa s 355 Akta menunjukkan kuasa diberikan kepada mahkamah untuk membuat perintah pengesahan berkaitan apa-apa ketinggalan, kecacatan atau luar aturan dalam pengurusan atau pentadbiran syarikat di bawah Akta. Pertimbangan penting di hadapan mahkamah menjalankan budi bicaranya adalah untuk memastikan bahawa apa-apa pengesahan sedemikian tidak akan mengakibatkan apa-apa prejudis kepada syarikat atau kepada mana-mana ahli atau pemiutang. Walau bagaimanapun, apa yang kelihatan seperti terlepas perhatian oleh pihak-pihak adalah bahawa sebelum s 355 boleh dibangkitkan, adalah penting untuk mengenal pasti ketinggalan, kecacatan atau luar aturan yang didakwa berlaku dalam pengurusan atau pentadbiran syarikat tersebut (lihat perenggan 18–19).

(2) Perayu-perayu sebenarnya memohon untuk perintah bahawa mereka tidak memungkiri apa-apa peruntukan Akta dalam kemasukan Borang 24 atau mendapatkan apa-apa keuntungan sebagai pengarah-pengarah yang memprejudis Virgin Properties. Walau bagaimanapun, mereka tidak memperincikan atau mengaku kepada mana-mana pelanggaran sedemikian. Apa yang nyata mereka memberitahu mahkamah adalah bahawa mereka tidak pasti sama ada terdapat apa-apa pelanggaran tetapi jika ada, mereka ingin mahkamah mengesahkan tindakan-tindakan mereka berkaitan Borang 24 (lihat perenggan 22).

(3) Hanya apabila pelanggaran didedahkan dan diakui, mahkamah dalam kedudukan untuk menentukan jika pengesahan sedemikian boleh diperintahkan selepas mempertimbangkan keadilan kes seperti yang dikehendaki oleh s 355 Akta. Mahkamah juga tidak dalam kedudukan untuk menentukan jika pelanggaran adalah satu yang boleh membentuk ketinggalan, kesilapan atau luar aturan seperti yang dibayangkan oleh s 355 kerana pelanggaran tidak diperincikan dan diakui. Oleh itu, s 355 Akta tidak terpakai kepada keadaan dalam kes ini (lihat perenggan 23).

(4) Kedua-dua s 354(1) dan (2) Akta mesti dibaca bersama untuk menentukan jika ia termasuk relief daripada prosiding jenayah. Ia tidak diniatkan untuk setiap sub-seksyen untuk berfungsi secara berbeza, jika ia adalah kesnya ia akan didedahkan dengan jelas. Subseksyen (2) walau bagaimanapun nyata merujuk balas kepada sub-s (1) dalam menyebut kuasa untuk melepaskan di bawah sub-s (1) dengan perkataan-perkataan '... same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought'. Rujukan kepada 'negligence' jelas mengecualikan prosiding jenayah (lihat perenggan 26).]

A **Notes**

For cases on directors in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 178–450.

Cases referred to

B *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 4 CLJ 195, FC (refd)

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449; [2013] 1 CLJ 24, FC (refd)

C *Customs and Excise Commissioners v Hedon Alpha Ltd and others* [1981] 2 All ER 697, CA (refd)

IDEAGLOBAL.COM Ltd, Re [2000] 3 SLR 100; [2000] SGHC 65, HC (refd)

Barry and Staines Linoleum, Limited, In Re [1934] Ch 227, Ch D (refd)

Lawson v Mitchell [1975] VR 579 (refd)

D *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal* [2015] 4 MLJ 701; [2015] 7 CLJ 149, FC (refd)

Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener) [2013] 1 SLR 1428; [2012] SGHC 250, HC (refd)

E *Long bin Samat & Ors v PP* [1974] 2 MLJ 152, FC (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Gilt Edge Safety Glass, Limited, In re [1940] Ch 495, Ch D (refd)

See Nyuk Fung & Ors v PanGlobal Equities Bhd [1991] 1 MLJ 152, SC (refd)

F *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200; [2015] 3 CLJ 1017, FC (refd)

Legislation referred to

G Companies Act [SG] ss 163(1), 391

Companies Act 1961 [AUS] s 365

Companies Act 1907 [UK] s 32

Companies Act 1929 [UK] s 372

Companies Act 1948 [UK] s 448

H Companies Act 1965 ss 132(2), (2)(c), 150, 354, 354(1), (2), 355, Form 24

Companies Act 1985 [UK] s 727

Companies Act 2006 [UK] s 1157

Companies Commission of Malaysia Act 2001 ss 3(1), 17, First Schedule

I Companies (Consolidated) Act 1908 [UK] s 279

Criminal Procedure Code s 376(1)

Federal Constitution art 145

Interpretation Acts 1948 and 1967 s 17A

Appeal from: Originating Summons No 24NCC-192-05 of 2014 (High Court, Kuala Lumpur)

Amer Hamzah Arshad (Melissa Ram) for the appellants.
Shopna Rani Malakar (Shopna Rani Malakar & Co) for the first respondent.
Ku Hayati bt Ku Haron (Mohamad Zainal Abidin bin Ahmad with her) (Senior Federal Counsel, Companies Commission of Malaysia) for the second respondent.

Harmindar Singh J:

INTRODUCTION

[1] This appeal from the Kuala Lumpur High Court is primarily concerned with the interpretation and scope of and ss 354 and 355 of the Companies Act 1965 ('the CA 1965'). The issue which confronted us, and we were informed that it was a novel question of law, was whether the said sections of the CA 1965 are wide enough to provide relief to the appellants against any proceedings under the CA 1965 including criminal proceedings.

[2] The appellants had filed the originating summons ('OS') in the High Court seeking essentially the following orders pursuant to ss 354 and 355 of the CA 1965:

(a) a declaration that the appellants as directors and shareholders of Virgin Properties Sdn Bhd ('Virgin Properties') did not use their position as directors to gain benefit or to cause prejudice to Virgin Properties in the lodgment of Form 24 of the Companies Act 1965 dated 13 August 2008 which showed that the paid up capital of Virgin Properties as RM7m;

(b) a declaration that the appellants as directors and shareholders of Virgin Properties did not breach any provision of the Companies Act 1965 in the lodgment of Form 24 of the Companies Act 1965 dated 13 August 2008 which showed the paid up capital of Virgin Properties as RM7m; and

(c) that the second respondent vide itself, employees, agents or in whatever form be restrained or prohibited from instituting any action or interfering with the court's jurisdiction in granting appropriate relief in relation to the lodgment of Form 24 of the Companies Act 1965 dated 13 August 2008 which showed the paid up capital of Virgin Properties as RM7m.

[3] The OS was however dismissed by the High Court on 25 August 2014 giving rise to this appeal. At the hearing of the appeal on 16 November 2015, and after having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our

decision on a date to be informed. In the meantime, parties were to furnish the court with further research on the prevailing position that obtained in other jurisdictions. Having been apprised of the position, this is now our decision.

THE FACTUAL BACKGROUND

[4] The relevant facts leading to the filing of the OS are well set out by the learned judge and can be summarised as follows. The first respondent is a company incorporated in Malaysia pursuant to the CA 1965. The appellants are both directors and shareholders of the first respondent. The second respondent is a corporate regulator established under s 3(1) of the Companies Commission of Malaysia Act 2001 ('Act 614') and entrusted with the statutory functions, inter alia, to ensure that the provisions of Act 614 and the laws specified in the First Schedule are administered, enforced, given effect to, carried out and complied with. It is also tasked with regulating matters relating to corporations and companies to encourage proper conduct amongst directors, secretaries and other officers of a corporation in order to ensure that all corporate and business activities are conducted in accordance with established norms of good corporate governance and to encourage and promote corporate responsibility and business sustainability (s 17 of Act 614).

[5] The appellants/directors intended to increase the paid up capital of the first respondent and instructed the company secretary, Augustine Gregory Dicom, to prepare the necessary documents. The company secretary prepared a draft of the documents and forwarded the same to the appellants/directors on 24 March 2008.

[6] On 13 August 2008, pursuant to a resolution prepared by the company secretary, the authorised share capital of the first respondent was increased from RM100,000 to RM10m. The appellant's position was that they were authorised by the general meeting resolution dated 29 February 2008 as follows:

> THAT pursuant to Section 132D of the Companies Act, 1965, the Directors be and are hereby authorized to issue and allot from the unissued capital of the Company such number of shares out of the unissued capital of the Company to any party of parties upon such terms and conditions and such purposes as the Directors may deem fit.

[7] On the same day, the appellants/directors pursuant to the authority given to them issued 7 million shares as follows:

Dinesh Kanavaji (first appellant)	3,430,000
Ku Azahar bin Ku Abdul Razak (second appellant)	3,570,000

The appellants and the first respondent filed the company Form 24 dated 13 August 2008 as required by the CA 1965 ('the said Form 24'). A

[8] Thereafter, after some time had lapsed, the second respondent received a complaint on 4 September 2012 regarding the actions and conduct of both appellants in their capacity as directors of the first respondent. Having examined the contents of the complaint, the second respondent commenced an investigation into the matter. The focus of the investigation was on the said Form 24 which was signed by the second appellant and the first respondent's company secretary, Augustine Gregory Dicom. B C

[9] According to the said Form 24, the appellants in their capacity as directors of the first respondent had allotted 7 million new shares of RM1 each to themselves with the first appellant allotted 3.43 million shares and the second respondent allotted 3.57 shares. This Form 24 was lodged in the second respondent's office and according to it all the newly allotted shares (7 million unit shares) were paid in cash by both appellants. D

[10] The first respondent then vide their letter dated 15 May 2013 wrote to the second respondent giving them notice that no irregularity has taken place or if there was, the first respondent would rectify or validate any issues provided the same was informed to them and as is permitted under s 355 of the CA 1965. E

[11] It however transpired that after the second respondent had completed their investigations and upon scrutinising the investigation papers, the public prosecutor had given the consent to initiate prosecution against the appellants in the Kuala Lumpur sessions court pursuant to s 132(2)(c) of the CA 1965. F

[12] In the meantime, representations were made to review any possible charge against the appellants. The second respondent however insisted that and ss 354 and 355 of the CA 1965 are not applicable to criminal proceedings where the prosecution of offences is involved. The appellants took the position that the threat to bring the charge against them was absurd and a non-starter because the appellants had consent of the general body and did not cause any detriment to the first respondent company as confirmed by the company itself. The appellants then filed the instant action under ss 354 and 355 of the CA 1965 for declarations as set out earlier. Under a certificate of urgency, the appellants also sought for an injunction to restrain the second respondent from instituting any action in relation to the said Form 24 as alluded to earlier. G H I

A FINDINGS OF THE HIGH COURT

[13] On the question of whether s 355 of the CA 1965 was relevant to the case at hand, the learned judge noted that s 355 is concerned with the rectification of irregularities in the management or administration of a B company, including the absence of quorum at any of a directors' or company meeting or default in the observance of the memorandum or articles of the company, including the failure to lodge any declaration of solvency. As such, the learned judge came to the conclusion that s 355 is not applicable in the C instant case.

[14] With regard to s 354 of the CA 1965, the learned judge agreed that the issue at hand is whether s 354 is wide enough to provide relief to the appellants against criminal proceedings. After considering the submissions advanced by D the parties, the learned judge came to a finding that s 354 of the CA 1965 applies only to civil proceedings and has no application to criminal proceedings. In coming to this view, the learned judge was heavily influenced by the decision of the Singapore High Court in *Re IDEAGLOBAL.COM Ltd* [2000] 3 SLR 100; [2000] SGHC 65 and adopted the reasoning and E approach in that case. The case of *IDEAGLOBAL* concerned s 391 of the Companies Act of Singapore (Cap 50) which is in pari materia with s 354 of the CA 1965.

[15] The learned judge agreed with the contention that if Parliament had F intended s 354 to extend to criminal proceedings, the Legislature would have drafted the provision in clearer and more explicit terms. The learned judge was also concerned that any such extension to criminal proceedings would encroach into the prosecutorial discretion of the public prosecutor in instituting criminal prosecutions thereby giving rise to the constitutionally of G such an action.

[16] For good measure, the learned judge also followed what was decided in another Singapore case, *Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit* H *Pte Ltd, intervener)* [2013] 1 SLR 1428; [2012] SGHC 250, and held that s 354 of the CA 1965 operated narrowly to afford relief to directors as against proceedings brought by the company only. Accordingly, it was further held that the appellants cannot be afforded relief as against proceedings brought by the second respondent.

I

OUR DECISION

[17] It would be convenient to first deal with the issue of whether s 355 of the CA 1965 is applicable in the instant case. For convenience s 355 is

reproduced as follows:

355 Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

(2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such as meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the Court –

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;

(b) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;

(c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

[18] A plain reading of s 355 of the CA 1965 indicates that power is given to the court to make a validating order in respect of any omission, defect or irregularity in the management or administration of a company under the CA 1965. The important consideration before the court exercises its discretion is to ensure that any such validation will not result in any injustice to the company or to any member or creditor.

[19] However, what appears to have been overlooked by the parties is that before s 355 can be invoked, it is essential to identify the omission, defect or irregularity which is alleged to have occurred in the management or administration of the company (*See Nyuk Fung & Ors v PanGlobal Equities Bhd* [1991] 1 MLJ 152).

[20] In *See Nyuk Fung*, a Supreme Court decision, a director of the respondent company had applied for relief under ss 150 and 355 of the CA 1965 whereby an order was sought from the High Court for the respondent company to convene an extraordinary meeting for the purpose of considering and if deemed fit to pass five resolutions in connection with the purchase of five properties. The application was granted. The appellants and others who were minority shareholders applied to intervene and upon leave being granted they applied for the setting aside of the ex parte order on the ground that the subject matter of the application is not within the purview of s 355 of the CA 1965. The learned judge dismissed the intervener's application who then appealed.

[21] In this connection the Supreme Court held, apart from the fact that the reasons given could not constitute an omission, defect or irregularity as required under s 355 of the CA 1965, that before there can be a basis for rectification or validation by the court, a breach of the Companies Act 1965 must have occurred or a default in the observance of the company's memorandum and articles must have taken place or a company's or director's meeting must have been rendered ineffective. The court observed that no breach of any kind had been particularised and conceded to render the purchase of the five properties void or ineffective.

[22] In the instant application, the appellants are in effect seeking an order that they have not breached any provisions of the CA 1965 in the lodgment of Form 24 or gained any benefit as directors to the prejudice of Virgin Properties. They have not particularised or conceded to any breach as such. What they appear to be telling the court is this – 'we are not sure if there was any breach but if there was we would like the court to validate our actions with respect to the said Form 24'.

[23] In the premises, and with respect, we do not think that the court is in any position to validate anything. The court would only be able to do so if the

breach is ascertained and particularised. In other words, only when a breach is disclosed and conceded will the court be in a position to determine if any such validation can be ordered after considering the justice of the case as required by s 355 of the CA 1965. In effect, the court is also in no position to determine if the breach is one that can constitute an omission, error or irregularity as envisioned by s 355 of the CA 1965 as the breach has not been particularised and conceded. We therefore agree that s 355 of the CA 1965 is not applicable to the circumstances in the present case.

Section 354 of the Companies Act 1965

[24] We now come to s 354 of the CA 1965. For convenience, s 354 is reproduced below:

354 Power to grant relief

(1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are –

(a) officers of a corporation;

(b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) any persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.

[25] The intention of the appellants here is to seek relief against their prosecution pursuant to an offence under s 132(2)(c) of the CA 1965. Since such proceedings have yet to commence, s 354(1) has no application as it

envisages a situation where proceedings have begun. Taken by itself, the words 'any proceeding' in s 354(1) may include criminal proceedings as the subsequent words 'default' and 'breach' may also include infringement of some penal provision. The difficulty here is that the words 'the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit' do not support a criminal proceeding as it is quite inconceivable how a court can relieve someone partly of a criminal charge. The use of the word 'liability' then must also connote civil liability.

[26] In any event, it is our view that both s 354(1) and (2) must be taken together to determine if they include relief from criminal proceedings. It cannot have been intended for each sub-section to operate differently for if that was the case it would have been explicitly made clear. Subsection (2) in any event appears to cross refer to sub-s (1) in alluding to the power to relieve under sub-s (1) with the words '... same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought'. Further, the reference to 'negligence' clearly excludes criminal proceedings.

[27] Now as alluded to earlier, s 354(2) operates differently from s 354(1) in that relief may be provided by the court where some action is apprehended and not yet taken. This is precisely the position here. However the word 'claim' in sub-s (2) limits the subsequent words 'negligence, default, breach of duty or breach of trust'. And the word 'claim' by any stretch cannot conceivably refer to a criminal prosecution. We are of the view that the word 'claim' in s 354(2) would also confine the words 'any proceeding' in sub-s (1) to civil proceedings. In the premises, we are constrained to hold that on a plain reading of s 354 of the CA 1965, it cannot apply to criminal proceedings.

[28] Apart from a plain reading of s 354 of the CA 1965, there are also other reasons for our view in limiting s 354 to civil proceedings. Firstly, we note that art 145 of the Federal Constitution gives a wide discretion to the Attorney General to institute, conduct or discontinue any proceedings for an offence other than proceedings before the Shariah Court, Native Court or a Court Martial (*Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152).

[29] This wide discretion, we would venture to add, means that the Attorney General under art 145 of the Federal Constitution has sole or exclusive discretion although not absolute or unfettered discretion to institute, conduct or discontinue proceedings which discretion can be delegated by law (*Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135). We have not overlooked the appellants' challenge of the exercise of such discretion by way of raising allegations of mala fide on the part of the second respondent in prosecuting the plaintiffs for reasons which appear

in the affidavits. Nevertheless, these allegations only become relevant if s 354 of the CA 1965 applies to criminal proceedings. A

[30] Be that as it may, since the Attorney General has sole discretion under art 145 to initiate, conduct or discontinue proceedings, any relief provided by the court under s 354 of the CA 1965 may tantamount to encroaching on the prosecutorial discretion by the Attorney General who is also by law the public prosecutor by virtue of s 376(1) of the Criminal Procedure Code. It cannot have been the intention of the framers of s 354 to impinge upon the prosecutorial discretion as that would lead to serious questions of unconstitutionality. B C

[31] The second reason, as pointed out by the learned judge at the High Court, is that if the Legislature had intended for s 354 to apply to criminal proceedings, it would have done so in clearer and more explicit terms. The draftsman would have easily foreseen the issue of whether s 354 ought to extend to criminal proceedings as there are many penal provisions in the CA 1965. The fact that the draftsman did not explicitly refer to criminal proceedings must mean that the intention was to exclude the same. This is not to suggest that the draftsman must provide for every contingency. We must accept that there will be many circumstances when the draftsman is unable to foresee every eventuality which will then create room for different interpretations. However the instant provision is not such a case. D E

[32] Learned counsel for the appellants also urged the court to have regard to s 17A of the Interpretation Acts 1948 and 1967 ('Act 388') and adopt a construction in accordance with the legislative purpose as intended by Parliament citing the Federal Court cases of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449; [2013] 1 CLJ 24; *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200; [2015] 3 CLJ 1017 and *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal* [2015] 4 MLJ 701; [2015] 7 CLJ 149. F G

[33] In this regard, and on the question of the application of s 17A of the Interpretation Acts 1948 and 1967, the Federal Court case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 4 CLJ 195 is instructive. Speaking for the court, Augustine Paul FCJ observed (at p 107 (MLJ); p 210 (CLJ)): H

> The choice prescribed in s 17A of '... a construction that would promote the purpose the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is I

A capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation.

B

[34] As we have stated earlier, the statutory interpretation of s 354 did not give rise to two or more interpretations. The plain meaning of the language used in the said provision was not in doubt. There is no ambiguity in our view. As we had observed, if there was any intention to include relief for criminal C liability the language used would have been clearer and emphatic. In the event, s 17A need not be resorted to in the instant case.

[35] Learned counsel for the appellants also fashioned persuasive arguments D on the historical background of s 354 of the CA 1965. He submitted that the court should consider the position in England from which our Companies Act 1965 has its origins. It is no doubt a historical fact that s 354 of the CA 1965 is based on s 448 of the English Companies Act 1948 ('the 1948 Act'). The English provision itself first appeared as s 32 of the UK Companies Act 1907. It then appeared as s 279 of the English Companies (Consolidated) Act 1908. E Section 279 was replaced by s 372 in the Companies Act 1929 with some changes until it later reappeared as s 448 of the Companies Act 1948, then as s 727 of the Companies Act 1985 and presently as s 1157 of the Companies Act 2006.

F

[36] In this regard, the earlier English cases of *In Re Barry and Staines Linoleum, Limited* [1934] Ch 227 and *In re Gilt Edge Safety Glass, Limited* [1940] Ch 495 and the much later English case of *Customs and Excise Commissioners v Hedon Alpha Ltd and others* [1981] 2 All ER 697 ('*Hedon* G *Alpha*') support the proposition that the English provision was designed to also cater for relief from penal consequences apart from civil liability. For example in the *Hedon Alpha* case, Ackner LJ in the English Court of Appeal observed (at p 703):

H That is sufficient to dispose of this appeal, but I accept that the true ambit of s 448, with one limited exception, is restricted to claims by or on behalf of the company or its liquidator against the officer or auditor for their personal breaches of duty. The only exception relates to the criminal process for the enforcement of certain specific duties imposed by the 1948 Act on the company's officers, eg the requirement to hold a specified share qualification.

I

[37] The English position of the relieving provision for criminal liability was however not followed in Australia. The Full Court of the Supreme Court of Victoria in *Lawson v Mitchell* [1975] VR 579 declined to follow the older English decisions and held that the relevant Australian provision (s 365 of the

Companies Act 1961 in pari materia with s 354 of the CA 1965) did not apply to criminal proceedings. It must be noted that the *Hedon Alpha* case came later in 1981. In *Lawson v Mitchell*, the magistrate had found that an offence had been made out against the defendant, a company director, for not causing true and fair accounting records to be kept. The defendant applied for relief pursuant to s 365 of the Companies Act 1961. The magistrate granted relief.

[38] Upon review to the Supreme Court, the primary issue for consideration was whether s 365 of the Companies Act 1961, which enables a court to relieve an officer of a corporation and others from liability for negligence, default, breach of duty or breach of trust where he had acted honestly and reasonably and having regard to the circumstances ought fairly to be excused, has any application to proceedings for an offence under the Act.

[39] The Supreme Court held that s 365 had no application to criminal liability and must be confined to relief from civil liability. Young CJ and Newton J in a joint judgment observed (at p 582):

> Notwithstanding the decisions in *Re Barry & Staines Linoleum Ltd,* [1934] Ch 227; [1933] All ER Rep Ext 1013, and *In re Gilt Edge Safety Glass, Limited* [1940] Ch 495; [1940] 2 All ER 237, to which we later refer, we consider that s. 365 empowers a court to grant relief from civil liability only. We consider that s. 365 has no application to criminal liability, whether upon a summary prosecution in a Magistrates' Court or upon indictment. These conclusions are, in our opinion, supported by a consideration of s 365 in its present form as a mere matter of statutory interpretation, and we believe that the conclusions are reinforced by a consideration of the history of the provision.

[40] This decision in *Lawson v Mitchell* was followed by the Singapore High Court in *Re IDEAGLOBAL.COM Ltd* [2000] 3 SLR 100; [2000] SGHC 65. In this case, the applicant, a Singapore company, paid a dividend to its shareholders believing the dividend would be tax exempt. In order to avoid its shareholders from adverse tax consequences, the company was advised by its legal and tax advisers that such payment could be treated as a loan to the shareholders. However one of the recipient shareholders turned out to be a company owned by one of the directors placing the company and its directors in breach of s 163(1) of the Companies Act (Cap 50). This provision prohibits loans to director related companies. Fearing criminal prosecution, the applicant applied for relief under s 391 of the Companies Act (Cap 50) (in pari materia with s 354 of the CA 1965). The main issue was whether the court had jurisdiction to grant relief under s 391 from prosecution for an offence.

[41] After a consideration of the English cases as alluded to earlier and the Australian case of *Lawson v Mitchell*, the court held that s 391 did not apply to criminal proceedings. It was held that if it did apply it would have the practical

problem in the operation of the provision as the issue of whether it would encroach into the prosecutorial discretion of the public prosecutor and whether such encroachment was unconstitutional would arise. It was further held that the provision would have been drafted in clearer terms if that was the intention.

[42] As we had observed earlier, this Singapore decision was followed by the High Court in the instant case. The learned judge adopted the reasoning and decision of in *Re IDEAGLOBAL.COM Ltd* in coming to her conclusion that s 354 of the CA 1965 only applied to civil proceedings. Learned counsel for the appellants now says that the learned judge was in error in following this decision and ignoring the English decisions.

[43] In this regard we are mindful of the considerable persuasive value of English decisions. We however note the significant passage of time since the decisions in *Re Barry & Staines Linoleum*, and *In re Gilt Edge Safety Glass* and regret the lack of a full discussion on the scope of the relevant English provision which would have served as a useful guide to the approach to be adopted. The other English case of *Hedon Alpha* was not really concerned with the question of whether s 448 of the 1948 Act applied to all criminal proceedings. The court there was confronted with the question of whether s 448 of the 1948 Act was wide enough to provide relief against proceedings brought by persons other than the company.

[44] In contrast, the decisions in *Lawson v Mitchell*, and *IDEAGLOBAL.COM Ltd*, are well reasoned and fully consider the scope of the relevant provisions. With respect, we find ourselves in agreement with the views expressed in these cases.

[45] We now come to the final issue. The learned judge appeared to have adopted a narrow construction of s 354 of the CA 1965 by adopting what was decided in the Singapore case of *Long Say Ting Daniel v Merukh Nunik Elizabeth*. The learned judge agreed with the view that s 354 of the CA 1965 operated narrowly to afford relief to directors as against proceedings brought by the company only and therefore the plaintiffs cannot be afforded relief as against proceedings brought by the second respondent.

[46] As it turned out, this pronouncement was unnecessary to the decision since it was held that s 354 of the CA 1965 did not apply to criminal proceedings. In view of our similar finding that s 354 has no application to criminal proceedings and since we did not have the benefit of full arguments on this issue of whether relief to directors under s 354 of the CA 1965 can only be provided in the case of proceedings brought by the company only, we will decline to offer our opinion at this time. This issue will have to be considered

open for decision in some other case at a more opportune time.

CONCLUSION

[47] In the circumstances, and for the reasons stated, we find no appealable error on the part of the learned judge. Accordingly we dismiss the appeal. As the appeal was primarily concerned with an issue of law of some importance in the commercial world, it is appropriate that there be no order as to costs. Order accordingly.

Appeal dismissed with no costs.

Reported by Afiq Mohamad